INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rules involved	2
Statement	4
Argument	11
Introduction and summary:	
A. The facts of record do not provide a sufficient basis for determining whether the notice of appeal should be deemed timely	12
B. The effect of counsel's actions on the timeliness of petitioner's appeal cannot be determined without further facts	22
Conclusion	27

CITATIONS

Cases:

Belton v. *United States*, 259 F. 2d 811	17
Black v. *United States*, 269 F. 2d 38, certiorari denied, 361 U.S. 938	17
Blunt v. *United States*, 244 F. 2d 355	17
Boruff v. *United States*, 310 F. 2d 918	26
Boykin v. *Huff*, 121 F. 2d 865	17
Calland v. *United States*, 323 F. 2d 405	21, 25
Carter v. *United States*, 168 F. 2d 310	18, 21
Casalduc v. *Diaz*, 117 F. 2d 915, certiorari denied *sub nom. Casalduc* v. *Gonzalez*, 314 U.S. 639	14
Central Paper Co. v. *Commissioner of Internal Revenue*, 199 F. 2d 902	14
Coppedge v. *United States*, 369 U.S. 438	16, 24
Crude Oil Corp. of America v. *Commissioner of Internal Revenue*, 161 F. 2d 809	16
Hetman v. *Fruit Growers Express Co.*, 200 F. Supp 234	16
Johansson v. *Towson*, 117 F. Supp. 729	14
Johnson v. *Esso Standard Oil Co.*, 181 F. Supp. 431	14
Jordon v. *United States District Court*, 233 F. 2d 362, vacated on other grounds *sub nom. Jordon* v. *United States*, 352 U.S. 904	17
Kuhler-Ellis Co. v. *Ohio Turnpike Commission*, 225 F. 2d 922	14

Cases—Continued

	Page
Kirksey v. *United States*, 219 F. 2d 499, certiorari denied, 358 U.S. 848	17
Lemke v. *United States*, 346 U.S. 325	17
Lehman v. *United States*, 237 F. 2d 645	18
Lett v. *United States*, 337 U.S. 421	13, 26
Lujan v. *United States*, 204 F. 2d 171	13
Milton v. *United States*, 105 F. 2d 253	14
Odle v. *United States*, 171 F. 2d 854, certiorari denied, 337 U.S. 943	18
O'Neal v. *United States*, 272 F. 2d 412	17
Owens-Illinois Glass Co. v. *District of Columbia*, 204 F. 2d 20	14
Pegnar v. *Commissioner of Internal Revenue*, 81 F. 2d 821	14
Remine v. *United States*, 161 F. 2d 1020, certiorari denied, 331 U.S. 863	16, 20
Riffe v. *United States*, 299 F. 2d 802	17
Rosenbloom v. *United States*, 355 U.S. 80	17, 18
Silverton v. *Valley Transit Cement Co.*, 237 F. 2d 143	14
Tillman v. *United States*, 268 F. 2d 422	17
United States v. *Bertone*, 249 F. 2d 156	13
United States v. *Duncan*, 310 F. 2d 367, certiorari denied, 373 U.S. 938	17
United States v. *Isthmian S.S. Co.*, 359 U.S. 314	26
United States v. *Lombardo*, 241 U.S. 73	14
United States v. *Robinson*, 361 U.S. 220	24, 25, 26
Wallace v. *United States*, 174 F. 2d 112, certiorari denied, 337 U.S. 947	16
Ward v. *Atlantic Coast Line R.R. Co.*, 265 F. 2d 75, reversed on other grounds, 362 U.S. 396	14
West v. *United States*, 222 F. 2d 774	17, 18
Williams v. *United States*, 188 F. 2d 41	16

Miscellaneous:

Federal Rules of Criminal Procedure:	
Rule 33	2, 12
Rule 37(a)	2
Rule 37(a)(2)	8, 12, 19, 22
Rule 45(b)	12
H.R. 7457, 88th Cong., 1st Sess	24
Second Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure	12, 22, 25
S. 1057, 88th Cong., 1st Sess	25

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 76–92) is reported at 306 F. 2d 697. The opinion of the district court (R. 49–53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1962 (R. 76, 93). A petition for rehearing was denied on October 11, 1962 (R. 98). Mr. Justice Black extended the time for the filing of a petition for a writ of certiorari to December 10, 1962, and the petition was filed within the time as extended. The writ was granted on June 17, 1963 (R. 100). 374 U.S. 826.

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

In the circumstances of this case, is a hearing necessary in order to determine whether petitioner's appeal from a judgment of conviction was timely?

RULES INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 37(a) of the Federal Rules of Criminal Procedure provides:

> (1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set

forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * * *

MICRO CARD 22
TRADE MARK ®

MATTHEW BENDER & COMPANY

5966

964

microcard

STATEMENT

Two indictments filed on November 2, 1960, in the United States District Court for the Southern District of Florida, charged petitioner and co-defendants James Dickson and Donald Alford with (1) conspiracy to steal Post Office property and falsely endorse and utter postal money orders, and (2) burglary of a post office and theft of currency and stamps (R. 1–6). The co-defendants each pleaded guilty to one indictment and petitioner was tried alone.

On January 5, 1962, Attorney Joel S. Moss, of Jacksonville was appointed to represent petitioner (see R. 11–12, 47–48, 49). On January 11, 1962, after a two-day jury trial on the consolidated charges, petitioner was found guilty as charged (R. 30, 31). Because of his physical condition (petitioner is a paraplegic), petitioner was placed in the Duval County Medical Center in Jacksonville and placed under guard. On January 15, 1962—four days after verdict—Judge Reeves sentenced the petitioner, who was represented by his appointed counsel, to twenty years' imprisonment (R. 32–41, 42–44).[1] Petitioner then asked the court, "May I appeal this case as an insolvent?" (R. 41). The court replied, "Oh, yes, you always have a right to appeal; the Government provides for that" (R. 41). After consulting with his attorney, petitioner was returned to the Medical Cen-

[1] During the sentencing proceedings, Judge Reeves, on the basis of a presentence report, said that the petitioner had "repeatedly violated the law", both federal and State; that petitioner had committed a "perfect catalog of crimes"; that petitioner was "a menace to society"; and that petitioner had perjured himself at the trial (R. 35–37).

ter. On January 16, at about 7:00 a.m., he was removed from the Center and transported to the United States Penitentiary at Atlanta, Georgia (R. 54, 75, 96).[2] Notice of appeal was not filed by January 25, 1962—the tenth day after the judgment of conviction was filed.

On January 29, 1962, the clerk of the district court at Jacksonville received and filed two letters which were signed by petitioner and dated January 23, 1962 (R. 45).[3] The letters were contained in a single envelope, which was under government frank and bore no date or postmark (R. 46). One letter read, in pertinent part (R. 45):

> I would like to appeal the court's decision in my case.
>
> I would like to get the court record as a pauper.

---

[2] The removal of petitioner was proper since he did not file an election not to commence service of his sentence. The special conditions under which petitioner was being held made it desirable that he be moved as soon as possible. Judge Simpson subsequently noted that petitioner was removed from the Medical Center on January 16 because of his physical condition and the expenses incurred in maintaining armed guards there (R. 50).

[3] The printed record incorrectly shows that the letter reflecting petitioner's desire to appeal the conviction was "filed" on "January 27, 1963" (see R. 45). The original district court file shows a typewritten transcription of petitioner's letter showing such date. However, the original letter is stamped as filed on January 29, 1962.

The printed record also incorrectly shows that the judgment and commitment on the second indictment was filed on June 15, 1962 (see R. 43). The original record, however, shows the date to be January 15, 1962.

The other letter read, in pertinent part (R. 45):

> Since I haven't heard from the lawyer I would like for this letter to ask for "A Motion for a New Trial".
>
> The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges.

Judge Simpson consulted with petitioner's court-appointed counsel and received from counsel a letter dated January 30, 1962, which read in pertinent part (R. 47–48):

> * * * [A]fter sentencing on January 15, 1962, I talked with Mr. Fallen approximately an hour and a half. At that time he asked me if I would be interested in representing him if he should decide to appeal the decision in those cases, since he thought he could raise sufficient funds to pay an attorney's fee in connection with such an appeal. At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal. Mr. Fallen thanked me very much for my efforts as his court appointed attorney, and stated that he would secure another attorney.
>
> I have not represented Mr. Fallen since that conversation.

On February 1, 1962, Judge Simpson determined that petitioner's notice of appeal was timely filed and would be so treated by the court of appeals, and that petitioner still had time to apply for leave to

appeal in forma pauperis (R. 52). He expressed doubts, however, as to whether the motion for a new trial was timely filed, and re-appointed Attorney Moss for the purpose of presenting that question, directing that it be heard before Judge Reeves when he returned to Jacksonville to complete the matters he had handled while sitting by designation (R. 52–53).

On February 14, 1962, Judge Simpson received a letter from the petitioner dated February 7, 1962. The letter read, in part (R. 54–55):

> On the 15th of January 1962, four days after I was found guilty, I was senteneed to 20 years. I asked Mr. Moss then if he would ask for a new trial and he said "He is (Judge Reeves) not going to grant you a new trial and besides my firm wants me to withdraw from the case under the circumstances". I told him it would not take but a few minutes to do that and if he wanted to withdraw from the case that I would try to get another attorney to go further with the case. Apparently he didn't file.
>
> The marshal then carried me back to the hospital and gave orders that I was not to have any visitors so I had not a chance to get anyone else to file for new trial for me. The next morning they brought me to Atlanta. I was sick at that time and it was on January 23, 1962 that I felt well enough to write. I didn't know that the motion had to be within five days but I did know the quicker it was filed the better it would be.
>
> If the court decides that I tried to get the appeal before then in the time limit and is

728-497—64——2

> going to give me a hearing I would at this time respectfully ask for a continuance of the hearing for this reason: I am in the process, through my friends of securing an attorney in the near future. Due to Mr. Moss' reluctance to have anything further to do with my case and the fact that I need more time to secure a record of my trial so an appeal can be intelligently presented to the court I earnestly hope you will grant me an extension of time on my motion for new trial.

On February 21, 1962, after a hearing at which the United States Attorney and petitioner's counsel were present, Judge Reeves treated petitioner's letter as a motion for new trial and denied it on the merits (R. 63–64). He expressly declined to rule on the timeliness of the application (R. 64). Notice of appeal was filed on the same day, and Judge Simpson granted petitioner leave to appeal in forma pauperis (R. 65–66, 67–68, 68–69).

On March 2, 1962, the government moved to dismiss the appeal on the ground that it had not been filed within the 10-day period fixed by Rule 37(a)(2), F.R. Crim P. (R. 70–71). The court of appeals appointed an attorney to represent the petitioner and set the cause down for hearing (R. 72). An affidavit from the petitioner, filed in the court of appeals, recited (R. 74–75):

> That I am the defendant in the above styled causes and that on the 11th day of January, 1962 I was found guilty as charged. That I was represented in said causes by my court-appointed attorney, Mr. Joel Moss of the Jacksonville Bar. That on the 15th day of Janu-

> ary, 1962 Mr. Moss appeared with me before the court when I was sentenced to twenty years on said conviction, this date being the first time I had seen Mr. Moss since January 11, 1962, the date I was found guilty of the charges in the above styled causes. Mr. Moss told me at that time that I would not be granted a new trial by Judges [*sic*] Albert Reeves and further more that the law firm that he was associated with did not want him to continue with the case. After this conversation with Mr. Moss on the 11th day of January, 1962, which was four days after conviction, I was returned to the Duval Medical Center, Jacksonville, Florida, where I was again placed under armed guard and not allowed to have visitors.
>
> On the morning of January 16, 1962 I was taken to Atlanta, Ga. to commence my term of imprisonment, where due to my illness and processing, I was unable to write to the court requesting a new trial until the 23rd of January, 1962.

On July 26, 1962, the court of appeals, one judge dissenting, granted the motion and dismissed the appeal (R. 76–92, 93). The majority held that the district court was without jurisdiction to pass on the merits of the motion for a new trial since it was filed more than five days after verdict and that the denial of the motion accordingly did not extend the time to appeal from the original judgment. With respect to the notice of appeal received on January 29, 1962, the court held that it was untimely; that the jurisdictional requirement of timely filing would not be met by the deposit of a notice in time to reach the

clerk's office in the usual course of mail delivery; and that there was nothing before the court to indicate that the authorities at Atlanta departed from the customary routine of promptly dispatching, uncensored and unread, a prisoner's mail addressed to a court.

Petitioner's application for rehearing, dated August 8, 1962, was filed in the court of appeals on August 15, 1962 (R. 94–97). The application recited, in part (R. 96):

> When I arrived there [at the penitentiary] I was sick and was put in the Hospital. After I felt better I asked some of the inmates did they know how long one had to appeal a case or a decision. I got answers ranging from five days to ninety days. Others said to ask for a new trial so I asked for both.
>
> On January 23, 1962, eight days after sentencing, I wrote to Judge Simpson and put it in the mailbox that is in the hospital, asking for a new trial and appeal. He said that a motion for a new trial would come under Judge Reeves, but he granted the appeal under forma pauperis.
>
> I was informed by Mr. Moss that Judge Reeves denied me a new trial but I wasn't able to find out why until I read in the appellate court decisions that it was on its merits.

On October 11, 1962, the court denied rehearing, one judge dissenting (R. 98).

ARGUMENT

INTRODUCTION AND SUMMARY

In our memorandum filed in this Court in response to the petition for a writ of certiorari, we suggested that, in the present posture of the case, there were unresolved questions of fact which bore importantly upon the timeliness of the appeal, and that, unless those issues were resolved, we could not take a position as to whether the appeal was or was not timely. Since the district court considered the appeal as timely filed, apparently on the sole basis of the date affixed to the letter, it had no occasion to consider when the notice of appeal was mailed. The court of appeals, on the other hand, undertook to decide the case on the basis of a rigid application of the receipt-of-notice rule without regard to the time of mailing and possible reasons for delay.

In our memorandum, we stated that we did not believe that an incarcerated defendant, without the aid of counsel, should be charged with delays brought about by the government affecting the filing of his papers in court. We believe that the rule followed by the court below that receipt is controlling is premised upon the fact that the litigant has free access to the clerk's office, to the mails, and to counsel, and should have no application where, as here, the defendant is incarcerated and is acting *pro se*. In our opinion, the issue is whether petitioner deposited his notice for mailing on time, a fact which we do not believe can be determined on this record. If it was in fact deposited on the date it bears, January 23, then in our view the appeal is timely and no other

issue is presented. If it was not, then it may be necessary to consider whether petitioner was sufficiently informed of the time for appeal, whether he was misled or abandoned by counsel, and the effect of counsel's action. Since, on this aspect of the case, there are sharp unresolved differences between Mr. Moss' and petitioner's versions of the conference following petitioner's sentencing (see R. 47–48, 54, 74–75), these issues, if they are involved at all, cannot be resolved on the present record.

A. THE FACTS OF RECORD DO NOT PROVIDE A SUFFICIENT BASIS FOR DETERMINING WHETHER THE NOTICE OF APPEAL SHOULD BE DEEMED TIMELY

Rule 37(a)(2), F.R. Crim. P., *supra*, provides that an appeal "may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for new trial * * * has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion". Rule 45(b), F.R. Crim. P., provides that the court "may not enlarge the period for taking any action under Rules 33, 34, and 35, except as otherwise provided in those rules, or the period for taking an appeal." And Rule 33, F.R. Crim. P., *supra*, requires that a motion for a new trial (other than a motion for new trial based on newly discovered evidence) "be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

There are four possible rules for determining whether an incarcerated defendant without counsel has filed his notice of appeal within the required 10-

day period.[4] (1) The defendant's notice of appeal might be considered timely only if it is received by the clerk within the 10-day period. (2) The notice might be considered timely only if the prisoner exercises all due care, in light of the delays resulting from the mail procedures of the prison, to have the notice reach the clerk within ten days. (3) The notice might be timely only if the defendant acts in time to have his notice reach the court by the tenth day, disregarding any delays in mailing which are caused by prison procedures and which can thus be charged to the government. (4) The notice might be timely if given to the prison authorities for forwarding any time within the ten-day period. We shall discuss each of these in turn. It will be apparent that, on all but the first alternative, additional facts are required to determine whether the petitioner's appeal was timely.

[4] In discussing these rules, we shall assume that the defendant has been informed by court or counsel or otherwise has timely knowledge of the requirements of prompt filing. We shall later discuss (*infra*, pp. 22–26) the additional problems which are presented if he does not have such knowledge.

The motion for a new trial, although denied on its merits without consideration of its timeliness, plays no part in the determination of the timeliness of the appeal in this case. The notice of appeal and the motion for new trial were deposited for mailing in the same envelope and thus on the same day. If this date was within the ten-day period for appeal, there is no need to consider the effect of denial of the motion for a new trial since, as we discuss *infra*, pp. 19–21, the notice of appeal would be timely. If this date was after the ten-day period (and thus the notice of appeal was untimely), the motion for a new trial was not made in time to extend the time for appeal, whether timeliness of the motion for this purpose be deemed five days or ten days after verdict. See *Lott* v. *United States*, 367 U.S. 421, and compare *United States* v. *Bertone*, 249 F. 2d 156, 159 (C.A. 3), with *Lujan* v. *United States*, 204 F. 2d 171 (C.A. 10).

1. The court below applied the general rule followed in civil cases: that, to be timely filed, a document must be in the actual or constructive custody[5] of the clerk of the court within the required time to constitute "filing." *E.g., Kahler-Ellis Co.* v. *Ohio Turnpike Commission,* 225 F. 2d 922 (C.A. 6); *Casalduc* v. *Diaz,* 117 F. 2d 915, 916 (C.A. 1), certiorari denied *sub nom. Casalduc* v. *Gonzalez,* 314 U.S. 639; *Silverton* v. *Valley Transit Cement Co.,* 237 F. 2d 143, 144 (C.A. 9); *Milton* v. *United States,* 105 F. 2d 253, 255 (C.A. 5). Under this rule, the deposit of a document in the mail addressed to the clerk of the court during the filing period, or its deposit in the mails so that, in due course, it should reach the clerk's office within the prescribed filing time is not a "filing" of the document in question, and an unforeseen delay in the mails will not excuse a late filing. *Poynor* v. *Commissioner of Internal Revenue,* 81 F. 2d 521, 522 (C.A. 5) (adverse flying weather causing a delay in airmail communications). This rule provides maximum certainty and ease of application. Its advantages were explained by this Court, in a somewhat different context, in *United States* v. *Lombardo,* 241 U.S. 73, 78–79:

---

[5] Constructive custody is found where the document has been received at the clerk's office in time although not timely stamped for filing. *E.g., Ward* v. *Atlantic Coast Line R.R. Co.,* 265 F. 2d 75, 80 (C.A. 5), reversed on other grounds, 362 U.S. 396; *Owens-Illinois Glass Co.* v. *District of Columbia,* 204 F. 2d 29 (C.A.D.C.); *Central Paper Co.* v. *Commissioner of Internal Revenue,* 199 F. 2d 902, 904 (C.A. 6); *Johansson* v. *Towson,* 177 F. Supp. 729 (M.D. Ga.); *Johnson* v. *Esso Standard Oil Co.,* 181 F. Supp. 431, 433–434 (W.D. Pa.).

> [O]ur attention has not been called to any case which decides that the requirement of a statute * * * that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. * * * If depositing in the post office of the statement prescribed be required by the statute it, of course, would satisfy the statute, but to which instant of time would it be referred and at what risk the time or delays of transportation?

We do not argue that the time of receipt is controlling in the circumstances of a case such as this. We believe it is of crucial importance that the decisions cited in support of the ruling of the court of appeals (R. 86) all involved situations where the appellant, unlike the petitioner here, was not incarcerated and had free access to the court, to use of the mails, and to the assistance of counsel. A prisoner must rely on the prison authorities to get his notice of appeal to court; he cannot take it or mail it himself, and he cannot send counsel with it. It would be unjust to make a prisoner's right to appeal completely subject to the possibility of an unexpected delay in the handling of prison mail, at least when this delay is wholly beyond the prisoner's control. For example, a prisoner who hands his notice of appeal to the appropriate authorities on the fifth day cannot be de-

nied an appeal because the notice is lost or delayed en route by a prison official. For this reason, in our view, the crucial fact with regard to the timeliness of a prisoner's notice of appeal must be when it was deposited with the prison authorities for mailing, not when it was received.[6]

There is substantial support for this view. The courts of appeals have entertained jurisdiction over appeals where the untimeliness in the filing of notices of appeal resulted from the fact that the defendant was incarcerated in a penitentiary a great distance from the district court (*Remine* v. *United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862); where the untimeliness was occasioned by the failure of a deputy United States Marshal promptly to forward a defendant's notice of appeal (*Williams* v. *United States*, 188 F. 2d 41 (C.A. D.C.)); and where the tardiness was indirectly caused by prison officials who delayed giving the defendant his incoming mail from the district court (*Wallace* v. *United States*, 174 F. 2d 112, 114 (C.A. 8), certiorari denied, 337 U.S. 947).

Moreover, in closely related areas this Court and the courts of appeals have been diligent to protect the rights of indigent prisoners to appeal. As this Court noted in *Coppedge* v. *United States*, 369 U.S. 438, n. 5

[6] Even in civil cases a minority of the courts adhere to the rule that "proof of regular mailing, in time to reach the [clerk of the court], in due course of mail, within the statutory filing period, [is] sufficient to support a finding that the [document] was timely filed." *Crude Oil Corp. of America* v. *Commissioner of Internal Revenue*, 161 F. 2d 809, 810 (C.A. 10); *Hetman* v. *Fruit Growers Express Co.*, 200 F. Supp. 234 (D. N.J.).

at 442–443, "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Court of Appeals."[7] A liberal view as to timeliness has also been taken by this Court where the actions of government officials, and not the neglect of the defendant, has been the cause of the delay. In *Rosenbloom* v. *United States*, 355 U.S. 80, the government conceded that the clerk of the district court did not mail to the petitioner or his attorney a notice of the entry of the court order denying petitioner's motion for a new trial and judgment of acquittal, as required under Rule 49(c), and the record did not show with sufficient particularity that petitioner or

[7] The courts have held as notices of appeal applications for leave to appeal in forma pauperis (*Tillman* v. *United States*, 268 F. 2d 422, 423 (C.A. 5); *West* v. *United States*, 222 F. 2d 774 (C.A.D.C.); *Blunt* v. *United States*, 244 F. 2d 355, 359 (C.A.D.C.); *Kirksey* v. *United States*, 219 F. 2d 499, 500 (C.A.D.C.), certiorari denied, 358 U.S. 848; *Black* v. *United States*, 269 F. 2d 38 (C.A. 9), certiorari denied, 361 U.S. 938); letters written by prisoners to the district courts which evince a desire to appeal (*United States* v. *Duncan*, 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938; *Boykin* v. *Huff*, 121 F. 2d 865 (C.A.D.C.); *Belton* v. *United States*, 259 F. 2d 811 (C.A.D.C.)); a letter written by a prisoner to a judge of the court of appeals which reflected a desire to appeal (*Riffle* v. *United States*, 299 F. 2d 802 (C.A. 5)); a mandamus petition filed in the court of appeals (*Jordan* v. *United States District Court*, 233 F. 2d 362 (C.A.D.C.), vacated on other grounds *sub nom. Jordan* v. *United States*, 352 U.S. 904); and a recital in an appeal bond filed in the district court that the defendant had sued out an appeal (*O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5)). See also, *Lemke* v. *United States*, 346 U.S. 325, where this Court held that the filing of a notice of appeal after verdict but prior to entry of judgment was simply a technical irregularity not impairing the jurisdiction of the court of appeals over the cause.

his counsel had actual notice of entry of such order. In reversing the dismissal of the appeal, this Court held (355 U.S. 80–81):

> * * * In our opinion the record in this case fails to show with sufficient certainty that petitioner or his attorney had actual notice of the entry of that order by reason of the proceedings which took place in the District Court on June 14. [citing cases.] What transpired at those proceedings is too ambiguous to permit the conclusion that petitioner and his attorney were not justified in believing that petitioner's time to appeal would begin to run on July 8. In these circumstances we think that the Court of Appeals erred in holding that petitioner's notice of appeal was untimely.[8]

2. A rule requiring the defendant to exercise due care to give his notice of appeal to the prison authorities in time for it to proceed through the channels for prison mail and still reach the court by the tenth day would result in the nearest approximation to the ten-day period proscribed by the rules while leaving the conditions of timely filing within the control of the defendant. It has, however, two disadvantages. First, it will frequently subject the incarcerated defendant without counsel to much more severe time limitations than those applicable to a defendant who has counsel and/or is released on bail. Under prison procedures, there may well be a delay of several days

[8] See similarly as to incarcerated defendants *Oddo* v. *United States*, 171 F. 2d 854, 855 (C.A. 2), certiorari denied, 337 U.S. 943; *Carter* v. *United States*, 168 F. 2d 310, 311 (C.A. 10); *West* v. *United States*, 222 F. 2d 774, 779 (C.A.D.C.); see also *Lohman* v. *United States*, 237 F. 2d 645 (C.A. 6).

in the transmission of mail from a federal prison. To comply with this rule a defendant incarcerated at a prison located at some distance from the trial court might be required to forward his notice of appeal at a much earlier date than that on which a defendant on bail at the place of trial must act. Second, and no less important, this rule would cause the greatest departure from the certainty and ease of application which has always been considered essential to a rule of timeliness of appeal. Determination that an appeal was or was not timely could turn, in a close case, on the litigation of comparatively complex factual issues as to the particular procedures for prison mail and the defendant's knowledge of these. The defendant, the government, and the court all benefit greatly from a rule that can easily be applied, with a maximum of certainty and the minimum of litigation that is consistent with fairness to the prisoner.

3 and 4. There is much to be said for each of the two remaining alternatives—charging the defendant with the responsibility for giving his notice to the prison authorities in time to arrive on the tenth day if there are no mailing delays occasioned by prison procedures or giving the defendant until the tenth day to hand his notice to the prison authorities. The former is more easily reconciled with the language of Rule 37(a). It, in effect, states that pursuant to the rule the defendant must do everything in his power to file a notice of appeal with the district court within the ten-day period, except that the defendant may disregard whatever delays are traceable to prison procedures and are, in that

sense, the responsibility of the government. While it may be inequitable to require an incarcerated defendant to bear the burden of the delays caused by prison procedures, he may fairly be held to that degree of care and prudence in meeting the filing date which is expected of any other person who uses the mails to carry on the ordinary affairs of life.

The last alternative—giving the defendant until the tenth day to deposit his notice of appeal with the prison authorities for forwarding—has the significant disadvantage of departing from the language of Rule 37(a) which states that an appeal "is taken by filing with the clerk of the district court a notice of appeal in duplicate" and requires this action to be taken within ten days. It does, however, have significant advantages which, we believe, make it preferable to the third alternative if the language of the rule is not thought to require a different result. First, it is more certain and can more easily be applied by prisoners and the courts. In particular, it avoids a factual issue as to the length of time it ordinarily takes to mail a letter from the locale of the prison to that of the court. Second, it eliminates the disadvantage which would otherwise result from the fact that the defendant may be incarcerated at some distance from the trial court rather than out on bail and free to file his notice of appeal in person at the court on the tenth day. See *Remine* v. *United States*, 161 F. 2d 1020, certiorari denied, 331 U.S. 862, where the Sixth Circuit held that a notice of appeal was timely on the ground that a prisoner could not be charged with the delays caused by incarceration at a great distance from the

trial court. Third, it forecloses the troublesome problems that would be created where a defendant was late in giving the prison authorities his notice of appeal but did not know the time mail ordinarily takes between the locale of the prison and that of the court. A defendant who has been removed to a distant prison perhaps ought not be charged with knowledge of the mail service from that location.

The notice of appeal in this case was dated January 23, the eighth day after judgment, and received January 29, the fourteenth day. If it was actually given to prison authorities on January 23, it would be timely under either of the last two rules we have discussed, and we would not contend that it was untimely. The difficulty with the case in its present posture is that we do not know when the notice of appeal was deposited for mailing. The district court apparently assumed that the date on the notice was accurate. We cannot, however, accept the position that the date written by a defendant on a notice of appeal should *ipso facto* be accepted as the date it was forwarded by the prisoner. Such a ruling would be an open invitation to fraud. On the other hand, although the district court is only abont 300 miles from the penitentiary so that six, or even four, days seems an unduly long time between mailing and receipt, the delay may well be the fault of prison routine since mail is not picked up every day. We therefore believe that the matter of time of mailing should be resolved at a hearing. See *Carter* v. *United States,* 168 F. 2d 310 (C.A. 10), and *Calland* v. *United States,* 323 F. 2d 405 (C.A. 7).

B. THE EFFECT OF COUNSEL'S ACTIONS ON THE TIMELINESS OF PETITIONER'S APPEAL CANNOT BE DETERMINED WITHOUT FURTHER FACTS

The question of the effect of counsel's actions on the timeliness of petitioner's appeal will arise only if it is found that the notice of appeal which petitioner filed *pro se* is not timely. On this issue, the facts are even cloudier than on the other aspect of the case.

The only fact which appears with certainty in the record is that petitioner and counsel did discuss the question of appeal immediately after petitioner was sentenced. We therefore reject petitioner's contention (Pet Br. 26–32) that under Rule 37(a)(2), F.R. Crim. P., the district court was required either to explain petitioner's appeal rights to him or insure that his appointed counsel would do so. Rule 37(a)(2) requires the sentencing court to inform "a defendent not represented by counsel" of his right to appeal, and, if the defendant so requests, the clerk "shall prepare and file forthwith a notice of appeal on behalf of the defendant." Since the petitioner was represented by his court-appointed counsel at sentencing, the court, under the present rules, was under no duty to advise him specifically of his rights of appeal at that time.[9] The rule contemplates that defense counsel will undertake this duty, and both petitioner's

[9] The Second Preliminary Draft of Proposed Amendments To The Rules Of Criminal Procedure suggests a change in the rules to deal with the problem of abandonment of a defendant by counsel immediately after sentencing. The draft of Rule 32(a)(2) requires the district court to notify every defendant—not just those without counsel at sentencing—of his right to appeal and "if the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

and counsel's letters show that the question of appeal was discussed (R. 47–48, 95).

However, beyond the fact that counsel did discuss with petitioner the question of appeal, the record is not clear as to what occurred. Counsel's letter to the court indicates that he talked with petitioner for about an hour and a half after conviction, told petitioner that he did not desire to handle any appeal, suggested that petitioner secure another attorney "without delay, so as not to forfeit his right to appeal," and that petitioner said he would do so (R. 47–48). The letter does not show whether the need for action without delay included a reference to the specific ten-day period for taking an appeal. Petitioner, on the other hand, stated in several places that he spoke with counsel for only a short time and that he did not know and was not told of the time limitations for taking an appeal (R. 54–55, 94–96). In our view, assuming that this question may be reached, the result may well vary depending upon whether petitioner's or counsel's version is accepted, an issue which cannot be resolved without a hearing. We think different considerations pertain (1) if counsel made it clear that he did not intend to take any part in the appeal but informed petitioner of the time for appeal; (2) if petitioner, even though he knew of the time for appeal, reasonably expected counsel either to take an appeal or at least to let petitioner know what he intended to do; and (3) if petitioner was abandoned by counsel without being informed at all of the time for appeal.[10]

[10] We shall not discuss separately the consequences of each of these factual variations as applied to petitioner's motion for a new trial. The relevance of the absence of counsel to the

1. If counsel, as stated in his letter, made it clear to petitioner that he would not handle an appeal, and if petitioner knew of the time to take an appeal, then we think that petitioner was bound to act within the time fixed by the rules. This is particularly clear if, as counsel stated in this case, petitioner indicated that he would himself secure another attorney, but we think the same rule would pertain without this additional factor. Considering how little is necessary to constitute a notice of appeal (see *supra*, p. 17, n. 7), it is not unreasonable to expect a defendant who knows of the time limitations to act within those limitations. "The indigent defendant will generally experience no material difficulty in filing a timely notice of appeal" (*Coppedge* v. *United States*, 369 U.S. 438, 442), and thereafter he will be assigned counsel to assist him in presenting his case. This is not a deprivation of the right to counsel, for once a defendant who wishes to appeal knows of the time period within which he must make the court aware of this fact, he has no further need of the assistance of counsel until after he has written to the court.[11]

---

timeliness of petitioner's motion for a new trial is, we believe, much the same as its relevance to the timeliness of petitioner's appeal.

[11] The practice in criminal cases is for the court of appeals to appoint counsel on request where an appeal has been taken or attempted. But the court of appeals has no jurisdiction to appoint counsel until either a notice of appeal (or a petition for leave to appeal in forma pauperis) has been filed. *United States* v. *Robinson*, 361 U.S. 220. Although many counsel appointed for the trial of a criminal case do file notices of appeal for defendants, counsel generally do not consider that their assignment carries that duty absolutely. The extent of the

2. A different picture would be presented if petitioner reasonably expected his attorney either to act or to notify petitioner of his intentions and counsel deliberately failed to do so. Ordinarily an attorney's mistake or "excusable neglect" in taking an appeal does not relieve a defendant from a strict application of the time limitations (*United States* v. *Robinson*, 361 U.S. 220); but there may be a difference between mistake and abandonment. An incarcerated defendant, who cannot readily check with his lawyer to find out what has been done, may not be bound by the failure of an attorney who agrees to act on his behalf and fails to do so. In *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7), the court of appeals remanded the cause to the district court for the purpose of conducting a hearing on defendant's allegations that his attorney had agreed to file a notice of appeal and had thereby led defendant to believe that this action had been taken for him. The court said, in part (*id.* at 408–409):

> We agree with counsel for appellant that one, who justifiably believes that he is represented by counsel and who instructs his counsel to appeal and is assured by counsel that

---

duty of counsel in this regard is a matter which properly should be considered in connection with the revision of the Rules. The Second Preliminary Draft proposes amending Rule 44 so that it would state: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." Almost identical language is contained in two bills now before Congress (see S. 1057 and H.R. 7457, 88th Cong., 1st Sess.).

the appeal will be filed, should not suffer a loss of rights if counsel proves faithless * * *.

3. Another possible variation suggested by the facts of record would arise if it were found that counsel made clear that he would not take an appeal so that petitioner had no reason to rely on counsel, but petitioner was not told and did not know of the time limitations for appeal. A panel of the Fifth Circuit, after the decision in this case, held in *Boruff* v. *United States*, 310 F. 2d 918, 921 (C.A. 5), that the ten-day appeal period would not commence to run until it was shown that the defendant, who did not have representation of counsel during the full ten-day period, was specifically apprised of his appeal rights. The court said that it was not an "unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period'".

All of these possible variations indicate the need for specific facts. The entire issue as to the duties of counsel may well be academic; it may be established that petitioner's notice was timely. Any statement of views going beyond the necessities of the case would seem inappropriate in view of the imminent revision of the Rules with respect to appeals in criminal cases. The proper place, we suggest, for a comprehensive definition of the duties of the courts and counsel with respect to appeals is in the revised rules. *United States* v. *Robinson*, 361 U.S. 220; *Lott* v. *United States*, 367 U.S. 421, 425–426. See *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 322–324.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment should be reversed and the cause remanded to the court of appeals with directions that it be remanded to the district court for the purpose of conducting a hearing as to the circumstances of petitioner's post-sentence conference with his attorney and the timing, deposit and mailing of his letters dated January 23, 1962.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

APRIL 1964

U. S. GOVERNMENT PRINTING OFFICE: 1964